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No. 743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN PILOTS ASSOCIATION, et al.;
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

and

AIR LINE PILOTS ASSOCIATION,
Intervenor.

REPLY BRIEF OF PETITIONERS

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I. The Relief Petitioners Seek Here

The Intervenor contends (Brief, p. 16) and the Respondent appears to contend (Brief, p. 2) that the relief Petitioners seek is from the agreement of September 21, 1962 entered into between the Intervenor and Southern Airways, which agreement the Peti-

tioners have attacked in the courts of the Fifth Circuit. The Intervenor and the Respondent are incorrect in so characterizing the Petitioners' contention. The Petitioners here seek relief from an order of the Civil Aeronautics Board which continues in effect as a bar to the relief which they seek in the Fifth Circuit. The relief they seek in the Fifth Circuit is from the agreement of September 21, 1962.

The Respondent also contends (Brief, p. 9), as does the Intervenor (Brief, p. 17), that the Complaint which the Petitioners filed in the Federal District Court in Georgia was directed primarily to the Board's order and only secondarily, if at all, to the bargaining agreement. This assertion is likewise incorrect. In its Complaint in Georgia the Petitioners said: "There is an immediate need for injunctive relief to preserve the status quo and protect the plaintiff against any further actions on the part of the defendants under the aforesaid contract of September 21, 1962 detrimental to the plaintiffs." The Petitioners' first prayer in their Complaint before the Georgia court was: "That defendants and each of them . . . be temporarily restrained and enjoined, at first during the pendency of this action and thereafter permanently, from enforcing or otherwise putting into operation the alleged contract of September 21, 1962." There were also prayers that Southern Airways be enjoined from dismissing any of the plaintiffs or according to any other person a seniority superior to theirs, that the Intervenor be enjoined from interfering in any manner with the employment status of the plaintiffs, and that both Southern Airways and the Intervenor be enjoined from conducting any further proceedings, whether before a court or a governmental agency, which might affect

the employment status of Petitioners, unless the Petitioners be first served with process and be made parties to such proceedings.

II. The Petition Is Timely

At page 2 of its Brief in Opposition to Certiorari, the Intervenor questions the timely filing of the Petition for Certiorari. It says that the time for filing the petition commenced to run when the Court of Appeals denied petitioners' Petition for a Rehearing on July 8, 1963.

A full statement of all matters occurring between the initial decision of the Court of Appeals and the filing of the Petition for Certiorari is as follows:

1. The original decision of the Court of Appeals was issued on July 13, 1963.

2. Petitioners filed a Petition for Rehearing on June 25, 1963, within the 15-day period allowed by Rule 26 of the Court of Appeals.

3. On July 5, 1963 petitioners mailed to the Court of Appeals their Motion for Argument before the Court En Banc. This requested the Court to grant argument before the full court sitting en banc on the Petition for Rehearing filed June 25, 1963.

4. The Petition for Rehearing was denied by the Court on July 8, 1963.

5. On July 8, 1963 the Clerk of Court advised petitioners' counsel that their motion for argument before the court en banc should have been filed within 15 days of the Court's decision of June 13, 1963 under Rule 26 of the Court of Appeals' rules. This rule, however, refers to rehearings, not to arguments en banc.

6. On July 10, 1963 petitioners filed their Motion for Leave to file a Motion for Argument Before the Court En Banc. In this motion they pointed out that neither Rule 26 nor any other rule specifically covers en banc matters.

7. The last-named motion was granted by the Court on July 16, 1963, and the Court ordered that the time for filing a Petition for Rehearing En Banc be extended to July 31, 1963.

8. Petitioners filed their Petition for Rehearing En Banc on July 30, 1963.

9. The Court denied Petitioners' Motion for Rehearing En Banc on October 14, 1963.

It thus appears that the time for filing the Petition for Certiorari commenced to run on October 14, 1963. Any filing of a petition for certiorari between July 8 and October 14, 1963 would have destroyed the jurisdiction of the Court of Appeals to take any further action.

Even if the petition of July 30 was untimely, "where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, 1940, 311 U.S. 262, 266, 61 S. Ct. 201, 203, 85 L. ed. 177. See also *Pfister* v. *Northern Illinois Finance Corp.*, 1942, 317 U.S. 144, 149, 63 S. Ct. 133, 87 L. ed. 146; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 1937, 300 U.S. 131, 137-8, 57 S. Ct. 382, 385-6, 81 L. ed. 557; *United States* v. *Healy*, 84 S. Ct. 553, 555 (Feb. 17, 1964).

III. The Tennessee District Court Decision

The Intervenor contends (Brief, p. 17), that the action of the Respondent, Civil Aeronautics Board, is not inconsistent with the determination of the District Court for the Middle District of Tennessee in *ALPA* v. *Southern Airways, Inc.*, 49 L.R.R.M. 3145 (1962). In contradiction to this statement, Petitioners quote from the decision of the said court (49 L.R.R.M. 3155) as follows:

> "15. In the Court's opinion, ALPA itself has not demonstrated its own good faith efforts toward settling the dispute to such a degree that it is now entitled to an equitable injunctive remedy that would require the discharge of the newly-hired pilots.
>
> The economic issues raised by ALPA's Section 6 opener, and other issues brought into the negotiations by the parties, had been fully processed through the procedures prescribed by the Act on February 17, 1960, when the National Mediation Board notified the parties that it was closing its file. Thirty days after that date, the parties were free to resort to self-help. However, before the strike was called, Southern, demonstrating its own good faith, informed ALPA that in the event of a strike, it would attempt to continue operations and that if it were successful in employing replacements, the replacements would have jobs and the strikers would not have jobs. Nevertheless, the strike was called and Southern began hiring replacements. When the parties next met on July 11 and 12, 1960, only forty-five or fifty replacements had been employed. In addition to economic proposals, ALPA conditioned settlement of the dispute upon an agreement that would have effectuated the discharge of these replacements in order to make room for the striking pilots, and further,

upon Southern's agreement to reinstate the strikers "without reprisal." The broad effect of the latter condition was that all strikers, including those who had engaged in assault, vandalism, or other personal misconduct should be reinstated. When Southern refused to accede to these demands, ALPA continued the strike, knowing that more new pilots would be employed. On July 28, 1960, when the final meeting was held, approximately 400 replacements had been employed. Even then, Southern agreed to return to service as many of the strikers as its needs dictated but with seniority dating from the date on which they returned to work. In addition, Southern reserved the right to take disciplinary action against the pilots who had engaged in misconduct during the strike. Except insofar as Southern sought the nonreviewable right to discipline, its demands were both lawful and, under the existing circumstances, reasonable. Nevertheless, the strike continued, more new pilots were employed, and all of the strikers were eventually replaced. While there is some uncertainty as to the exact terms upon which the replacements were employed, the record affirmatively establishes that they were led to believe that, absent legal intervention, their employment would be permanent.

The Court concludes that employment of the new pilots was begun and continued because of ALPA's own demands and its rejection of lawful and reasonable conditions imposed by Southern." It follows that Southern may not now be required to discharge the pilots hired to fill the places of the strikers. NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 345, 2 LRRM 610; NLRB v. Robinson, supra, 251 F. 2d 639, 641; 41 LRRM 2317 (6th Cir. 1958).

In calling and continuing the strike, ALPA was exercising its legal right. However, in now seek-

ing a harsh remedy that would require discharge of the replacements, ALPA does not come into court with clean hands.

16. Upon consideration of the entire record, the Court concludes that the only remedial relief to which plaintiffs are entitled is an injunction restraining Southern from raising as a condition of entering to an agreement with ALPA, the rights of the striking employees to review, through the grievance machinery and procedure contemplated by the Act, any disciplinary action taken by Southern against the striking employees.

Respectfully submitted.

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